Queensway Nominees (Asing) Sdn Bhd & Ors v ISM Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCC)(W)-1220–07 OF 2019 AND W-02(NCC)(W)-1341–07 OF 2019
RAVINTHRAN, MARIANA YAHYA AND LIM CHONG FONG JJCA
21 OCTOBER 2024

Companies and Corporations — Oppression — Minority shareholders — Shareholders entered into joint venture to acquire and develop lands — Minority shareholder in joint venture brought oppression action against majority shareholders — High Court allowed oppression action — Conduct amounting to oppression — Demand by majority shareholders for minority shareholders to contribute in purchase of lands — Majority shareholders undertaken rights issue of share which had the effect of diluting minority shareholder's holding in joint venture companies — Imposition of interest on shareholder advances — Refusal of majority shareholders to re-elect director of minority shareholder's company as director of joint venture companies — Transfer of one share each by majority shareholders to another company to fulfill quorum requirements for shareholders meetings — Whether High Court judge had rightly in law and fact found that case for oppression had been made out against majority shareholders within the meaning of s 181 of the Companies Act 1965

ISM Sdn Bhd ('ISM') had filed five civil suits ('the oppression actions') pursuant to s 181 of the Companies Act 1965 ('the CA 1965') against the appellants. The core dispute between the parties concerned the obligations of the respective parties to provide funding to five companies ('the JV companies') which were incorporated to fulfill the purposes of the joint venture between the parties which were: (a) to acquire several plots of lands comprising the CN lands, the De Vegas lands and the Imbi lands ('the lands') for a large-scale integrated commercial development known as the Imbi Project; (b) to prepare the relevant development plans; and (c) to obtain development order. The JV companies were Queensway Nominees (Asing) Sdn Bhd ('QNA'), Queensway Nominees (Tempatan) Sdn Bhd ('QNT'), West-Jaya Sdn Bhd ('WJSB'), Mulpha Kluang Maritime Carriers Sdn Bhd ('MKMC') and Leisure Dotcom Sdn Bhd ('LDC'). ISM contended that the funding for the JV companies ought to be divided into a cash portion and a loan portion, apportioned on a 30:70 basis with ISM was only responsible to contribute 30% of the cash portion. The sixth appellant, MPHB Capital Bhd ('MPHB') on the other hand argued that such funding ought to have been provided in proportion to their agreed equity interest, ie, on a 70:30 basis. In the oppression actions, the alleged oppressive conduct of the appellants were as followed: (i) the demand

by MPHB that ISM to contribute 30% of the purchase price for the land that was acquired by LDC ('the first issue'); (ii) the rights issue of shares undertaken by QNA, QNT and MKMC and the manner how those rights issues were carried out which had the effect of diluting ISM's holdings in each of the JV companies from 30% to fraction of 1% ('the second issue'); (iii) the imposition of interest on the shareholder advances made by MPHB for the cash proportion of the funding to the JV companies ('the third issue'); (iv) the refusal to re-elect Dato' Ray Cheah ('PW1') as a director of the five JV companies ('the fourth issue'); and (v) the transfer of one share each of LDC, MKMC and WJSB to Jayavest Sdn Bhd (a company in the MPHB group of companies) in order to fulfill quorum requirements for shareholders meetings ('the fifth issue'). The High Court had allowed the oppression actions as well as part of damages sought by ISM in the statement of claim. The High Court's finding was premised on the following bases: (A) that the JV companies were quasi-partnership; (B) that the acts complained of contravened the terms of the oral shareholders' agreement between MPHB and ISM; and (C) in connection with the differing treatment of interest on the cash portion. Dissatisfied with the decision, ISM filed Appeal 1341 against the High Court's decision in only allowing part of the damages claimed by ISM. The appellants on the other hand filed Appeal 1220 against the whole decision of the High Court in allowing the oppression actions. The issue that arose was whether the learned High Court judge had rightly in law and fact found that the case for oppression had been made out against the appellants within the meaning of s 181 of the CA 1965. Before the hearing of both appeals, ISM had raised preliminary objection on two points: (1) the appellants could not pursue an appeal against the High Court's decision in dismissing the appellants' counterclaim considering that it was not mentioned in the notice of appeal or memorandum of appeal; and (2) the learned High Court judge had erred in awarding damages without hearing evidence from witnesses and/or parties' submissions.

Held, allowing Appeal 1220 with costs of RM200,000 here and below subject to the allocator, and dismissing Appeal 1341 with no order as to costs:

(1) The court was of the considered view that the notice of appeal only mentioned 'appeals to the Court of Appeal against the whole decision of the said decision in allowing the plaintiff's claim pursuant to s 181 of the Companies Act 1965'. The court's reading of the quoted words was that the appellants had been limited to the decision in respect of the claim of ISM that had been allowed only. The subject of appeal was ambiguous in which case, ISM should not be put in a position to defend the counterclaim. Accordingly, the court ruled that the decision of the High Court on the counterclaim could not be pursued in the present appeal (see para 5).

(2) The statute stated that what was actionable was the 'affairs of the company', not the 'affairs of the shareholders'. In the present case, ISM's

director, PW1 had admitted that Caribbean Gateway Sdn Bhd ('CG') was the beneficial owner of the lands and even ISM's shareholders' agreement related to CG and not the five companies. Therefore, it was abundantly clear that the joint venture entity was not the five companies but rather, CG. All in all, the joint venture remained an unincorporated joint venture and there was not even a joint venture term that was applicable to the five companies. Consequently, there was no 'affair' or business that vested in these five companies. Additionally, there was no abuse or oppression could arise in these five companies (see paras 42, 46–47 & 49).

(3) It was trite that 'just and equitable principles' could only be applied in cases for minority oppression under s 181 of the CA 1965 where the company was a quasi-partnership, and not in any other circumstance. Further, the court was bound by the Federal Court's decision in the case of *Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ors and another appeal* [2013] 2 MLJ 297 which established that a quasi-partnership required a relationship of a personal character. If it was not a quasi-partnership, a breach of a shareholders' agreement could not sustain or be the basis of an oppression suit. Considering the facts of the case, the court was of the considered view that the relationships between ISM (Dato' Ray Cheah) and MPHB were more of a purely commercial relationship and arm's length as compared to a personal relationship which would not likely give rise to a quasi-partnership (see paras 52, 54 & 62).

(4) In relation to the first issue, the documents, evidence, and facts in the present case clearly showed that it had always been the responsibility of ISM/PW1 to pay 30% of the entire purchase price and costs of acquiring the lands in the event ISM intended to have 30% interest in the lands. The conduct of PW1 himself and on behalf of ISM spoke volumes about the responsibility to pay 30% of the entire purchase price and costs of acquiring the lands. The court was of the view that PW1's allegation that payment of RM2.243m was made as a gesture of goodwill besides payment of RM400,000 to improve the cash flow did not commensurate with PW1's evidence and such allegation was an afterthought. The court found that the learned High Court judge erred in his finding that the demand made by MPHB amounted to an act of oppression against ISM (see paras 67, 72 & 75–76).

(5) With regard to the second issue, it was a clear term of the unincorporated joint venture that ISM would have to pay for 30% of the purchase price and acquisition costs of all the land jointly acquired. It was open to MPHB to compel ISM to adhere to the terms of the venture, and to pay for its proportion of the land and costs in acquiring the land. In the present case, PW1 did not adhere to its bargain to pay for 30% interest in

the Imbi lands and thus could not held 30% interest in the land. It was for this reason that the rights issue of share was the appropriate method to correct the inequity of the shareholding structure in the JV companies compared to the interest in the Imbi lands. Based on the above reason, it would be wrong for the learned High Court judge to find that the rights issue of share was prejudicial to ISM as it reduced ISM's 30% interest to a fraction of a one percent (see paras 77 & 80).

(6) With respect to the third issue, the court agreed with the submission of the appellants' counsel that the charging interest on the monies advanced by MPHB to the five companies including ISM was well within what was agreed between the parties and this could not form the basis of a claim of oppression (see para 82).

(7) In relation to the fourth issue, the court agreed with the learned High Court judge's finding that the refusal by the directors of the JV companies to re-elect PW1 as a director of the JV companies did not change the fundamental basis of the relationship, which was that all decisions or all major decisions affecting the JV companies could only have been made and implemented with the concurrence of both ISM and MPHB. As for the fifth issue, the court concurred with the learned High Court judge's finding that the transfer of the one share was not oppressive to ISM or prejudicial to its interest. It was not the transfer of one share in the relevant JV Companies that was objectionable, but rather the rights issue proposal was forced through the general meetings in the face of objections by ISM (see paras 82–83).

(8) Both parties before the High Court had agreed that damages would be determined after the finding of liability was made and this was acknowledged by the learned High Court judge. Since the finding of oppression was without basis and ISM failed to prove that the affairs of the company were being conducted or the powers of the directors were being exercised in a manner oppressive to one or more of the members within the meaning of s 181 of the CA 1965 as claimed by ISM in the present case, it would be just and fair that no buyout or damages ought to be awarded against the appellants (see paras 86–87).

[Bahasa Malaysia summary

ISM Sdn Bhd ('ISM') telah memfailkan lima saman sivil ('tindakan-tindakan penindasan tersebut') menurut s 181 Akta Syarikat 1965 ('AS 1965') terhadap perayu-perayu. Teras pertikaian antara pihak-pihak adalah berkenaan kewajipan setiap pihak untuk menyediakan pembiayaan kepada lima syarikat ('syarikat-syarikat JV tersebut') yang telah diperbadankan untuk memenuhi tujuan usaha sama antara pihak-pihak tersebut iaitu: (a) untuk mengambil alih beberapa bidang tanah yang terdiri daripada tanah CN, tanah De Vegas dan tanah Imbi untuk pembangunan komersial bersepadu berskala besar yang

A dikenali sebagai Projek Imbi; (b) untuk menyediakan rancangan pembangunan yang berkaitan; dan (c) untuk mendapatkan perintah pembangunan. syarikat-syarikat JV tersebut terdiri daripada Queensway Nominees (Asing) Sdn Bhd ('QNA'), Queensway Nominees (Tempatan) Sdn Bhd ('QNT'), West-Jaya Sdn Bhd ('WJSB'), Mulpha Kluang Maritime B Carriers Sdn Bhd ('MKMC') dan Leisure Dotcom Sdn Bhd ('LDC'). ISM menegaskan bahawa pembiayaan untuk syarikat-syarikat JV tersebut sepatutnya dibahagikan kepada bahagian tunai dan bahagian pinjaman, yang dibahagikan pada skala 30:70 dengan ISM hanya bertanggungjawab menyumbang 30% daripada bahagian tunai. Perayu keenam, MPHB Capital C Bhd ('MPHB') sebaliknya berhujah bahawa pembiayaan tersebut sepatutnya disediakan mengikut kadar kepentingan ekuiti yang dipersetujui mereka, iaitu, pada skala 70:30. Dalam tindakan-tindakan penindasan tersebut, perlakuan-perlakuan penindasan yang didakwa terhadap perayu-perayu adalah seperti berikut: (i) tuntutan MPHB supaya ISM menyumbang 30% daripada D harga pembelian tanah yang telah diambil alih oleh LDC ('isu pertama'); (ii) terbitan hak saham yang dijalankan oleh QNA, QNT dan MKMC dan cara bagaimana terbitan hak tersebut dijalankan yang mempunyai kesan mencairkan pegangan ISM dalam setiap syarikat-syarikat JV tersebut daripada 30% kepada pecahan 1% ('isu kedua'); (iii) pengenaan faedah ke atas wang E yang didahulukan oleh pemegang saham yang dibuat oleh MPHB bagi bahagian tunai pembiayaan tersebut kepada syarikat-syarikat JV tersebut ('isu ketiga'); (iv) keengganan untuk memilih semula Dato' Ray Cheah ('PW1') sebagai pengarah lima Syarikat JV tersebut ('isu keempat'); dan (v) pemindahan satu saham oleh LDC, MKMC dan WJSB setiap satu kepada F Jayavest Sdn Bhd (sebuah syarikat dalam kumpulan syarikat MPHB) untuk memenuhi keperluan korum untuk mesyuarat pemegang-pemegang saham ('isu kelima'). Mahkamah Tinggi telah membenarkan tindakan-tindakan penindasan tersebut serta sebahagian daripada ganti rugi yang dipohon oleh ISM dalam pernyataan tuntutannya. Dapatan Mahkamah Tinggi adalah G berdasarkan asas-asas berikut: (A) bahawa syarikat-syarikat JV tersebut adalah separa perkongsian; (B) bahawa perbuatan yang diadukan melanggar syarat perjanjian lisan pemegang-pemegang saham antara MPHB dan ISM; dan (C) berkaitan dengan pengenaan faedah yang berbeza ke atas bahagian tunai tersebut. Tidak berpuas hati dengan keputusan tersebut, ISM memfailkan H Rayuan 1341 terhadap keputusan Mahkamah Tinggi yang hanya membenarkan sebahagian daripada ganti rugi yang dituntut oleh ISM. Perayu-perayu pula memfailkan Rayuan 1220 terhadap keseluruhan keputusan Mahkamah Tinggi yang membenarkan tindakan-tindakan penindasan tersebut. Isu yang timbul ialah sama ada hakim Mahkamah Tinggi I yang bijaksana telah dengan betul mendapati, dari segi undang-undang dan fakta, bahawa kes penindasan telah dibuktikan terhadap perayu-perayu mengikut pengertian s 181 AS 1965. Sebelum pendengaran kedua-dua rayuan, ISM telah membangkitkan bantahan awal mengenai dua perkara: (1) perayu-perayu tidak boleh meneruskan rayuan terhadap keputusan

Mahkamah Tinggi yang menolak tuntutan balas perayu-perayu memandangkan ia tidak dinyatakan di dalam notis rayuan atau memorandum rayuan; dan (2) hakim Mahkamah Tinggi yang bijaksana telah terkhilaf dalam memberikan ganti rugi tanpa mendengar keterangan daripada saksi-saksi dan/atau hujahan pihak-pihak.

Diputuskan, membenarkan Rayuan 1220 dengan kos RM200,000 di sini dan di bawah tertakluk kepada alokator, dan menolak Rayuan 1341 tanpa perintah berkaitan kos:

(1) Mahkamah berpendapat bahawa notis rayuan hanya menyebut 'appeals to the Court of Appeal against the whole decision of the said decision in allowing the plaintiff's claim pursuant to s 181 of the Companies Act 1965'. Pembacaan mahkamah terhadap perkataan-perkataan yang dipetik tersebut adalah bahawa perayu-perayu telah dihadkan kepada keputusan berkenaan dengan tuntutan ISM yang dibenarkan sahaja. Subjek rayuan adalah samar-samar dalam kes ini, ISM tidak sepatutnya diletakkan dalam kedudukan untuk mempertahankan diri terhadap tuntutan balas tersebut. Sehubungan itu, mahkamah memutuskan bahawa keputusan Mahkamah Tinggi mengenai tuntutan balas tersebut tidak boleh diteruskan dalam rayuan semasa (lihat perenggan 5).

(2) Statut menyatakan bahawa apa yang boleh diambil tindakan adalah 'hal-ehwal syarikat', bukan 'hal-ehwal pemegang-pemegang saham'. Dalam kes semasa, pengarah ISM, PW1 telah mengakui bahawa Caribbean Gateway Sdn Bhd ('CG') adalah pemilik benefisial tanah tersebut dan perjanjian pemegang saham ISM juga adalah berkaitan CG dan bukannya lima syarikat tersebut. Oleh itu, jelas sekali bahawa entiti usaha sama yang berkaitan bukanlah lima syarikat tersebut tetapi sebaliknya adalah CG. Secara keseluruhannya, usaha sama tersebut kekal sebagai usaha sama yang tidak diperbadankan dan tidak ada terma-terma usaha sama yang terpakai kepada lima syarikat tersebut. Oleh yang demikian, tidak ada 'hal-ehwal' atau perniagaan yang terletak hak kepada lima syarikat ini. Selain itu, tiada penyalahgunaan atau penindasan boleh timbul dalam lima syarikat ini (lihat perenggan 42, 46–47 & 49).

(3) Sudah ditetapkan bahawa 'just and equitable principles' hanya boleh digunakan dalam kes bagi penindasan minoriti di bawah s 181 AS 1965 apabila syarikat yang berkaitan adalah perkongsian separa, dan bukan dalam apa-apa keadaan lain. Selanjutnya, mahkamah terikat dengan keputusan Mahkamah Persekutuan dalam kes *Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ors and another appeal* [2013] 2 MLJ 297 yang menetapkan bahawa perkongsian separa memerlukan perhubungan yang bersifat peribadi. Jika ia bukan perkongsian separa, pelanggaran perjanjian pemegang-pemegang saham tidak dapat dikekalkan atau menjadi asas bagi saman penindasan.

Mengambil kira fakta kes, mahkamah berpendapat bahawa hubungan antara ISM (Dato' Ray Cheah) dan MPHB adalah lebih kepada hubungan komersial dan tulus semata-mata berbanding hubungan peribadi yang mana hubungan tersebut tidak mungkin menimbulkan perkongsian separa (lihat perenggan 52, 54 & 62).

(4) Berhubung dengan isu pertama, dokumen, keterangan dan fakta dalam kes semasa dengan jelas menunjukkan bahawa ia sentiasa menjadi tanggungjawab ISM/PW1 untuk membayar 30% daripada keseluruhan harga pembelian dan kos pengambilan tanah tersebut sekiranya ISM berhasrat untuk memiliki 30% kepentingan ke atas tanah tersebut. Tindakan PW1 sendiri dan tindakannya bagi pihak ISM menunjukkan tanggungjawabnya untuk membayar 30% daripada keseluruhan harga pembelian dan kos pengambilan tanah tersebut. Mahkamah berpandangan bahawa dakwaan PW1 bahawa pembayaran RM2.243 juta dibuat sebagai tanda muhibah selain pembayaran RM400,000 untuk menambah baik aliran tunai tidak selari dengan keterangan PW1 dan dakwaan tersebut adalah pemikiran terkemudian. Mahkamah mendapati hakim Mahkamah Tinggi yang bijaksana terkhilaf dalam dapatannya bahawa tuntutan yang dibuat oleh MPHB adalah satu tindakan penindasan terhadap ISM (lihat perenggan 67, 72 & 75–76).

(5) Berkenaan dengan isu kedua, terma yang jelas bagi usaha sama yang tidak diperbadankan tersebut adalah bahawa ISM perlu membayar 30% daripada harga pembelian dan kos pengambilan semua tanah tersebut yang diambil alih secara bersama. MPHB berhak untuk memaksa ISM supaya mematuhi terma-terma usaha sama tersebut, dan membayar bahagian tanah dan kosnya dalam mengambil alih tanah tersebut. Dalam kes semasa, PW1 tidak mematuhi tawarannya untuk membayar 30% faedah dalam tanah Imbi dan dengan itu tidak boleh memegang 30% kepentingan dalam tanah tersebut. Atas sebab inilah terbitan hak saham adalah kaedah yang sesuai untuk membetulkan ketidaksamaan struktur pegangan saham dalam syarikat-syarikat JV tersebut berbanding kepentingan dalam tanah Imbi tersebut. Berdasarkan alasan di atas, adalah salah bagi hakim Mahkamah Tinggi yang bijaksana untuk mendapati bahawa terbitan hak saham tersebut memudaratkan ISM kerana ia mengurangkan kepentingan 30% ISM kepada pecahan satu peratus (lihat perenggan 77 & 80).

(6) Berkenaan dengan isu ketiga, mahkamah bersetuju dengan penghujahan peguam perayu-perayu bahawa caj faedah ke atas wang yang didahulukan oleh MPHB kepada lima syarikat tersebut termasuk ISM adalah bertepatan dengan apa yang dipersetujui antara pihak-pihak dan ini tidak boleh menjadi asas kepada tuntutan penindasan (lihat perenggan 82).

(7) Berhubung dengan isu keempat, mahkamah bersetuju dengan keputusan hakim Mahkamah Tinggi yang bijaksana bahawa keengganan pengarah syarikat-syarikat JV tersebut untuk memilih semula PW1 sebagai pengarah syarikat-syarikat JV tersebut tidak mengubah asas penting perhubungan mereka, iaitu semua keputusan atau semua keputusan utama yang melibatkan syarikat-syarikat JV tersebut hanya boleh dibuat dan dilaksanakan dengan persetujuan kedua-dua ISM dan MPHB. Bagi isu kelima, mahkamah bersetuju dengan keputusan hakim Mahkamah Tinggi yang bijaksana bahawa pemindahan satu saham tersebut tidak menindas ISM atau memudaratkan kepentingannya. Bukan pemindahan satu saham dalam syarikat-syarikat JV yang berkaitan yang tidak disenangi, sebaliknya cadangan terbitan hak tersebut telah dipaksa melalui mesyuarat agung walaupun terdapat bantahan daripada ISM (lihat perenggan 82–83).

(8) Kedua-dua pihak di hadapan Mahkamah Tinggi telah bersetuju bahawa ganti rugi akan ditentukan selepas dapatan liabiliti dibuat dan ini telah diakui oleh hakim Mahkamah Tinggi yang bijaksana. Memandangkan dapatan penindasan adalah tanpa asas dan ISM gagal untuk membuktikan bahawa hal ehwal syarikat dikendalikan atau kuasa pengarah dijalankan dengan cara yang menindas satu atau lebih ahli-ahli dalam pengertian s 181 AS 1965 seperti yang didakwa oleh ISM dalam kes semasa, adalah adil dan saksama bahawa tiada pembelian atau ganti rugi patut diperintahkan terhadap perayu-perayu (lihat perenggan 86–87).]

Cases referred to

Brett v Migration Solutions Holding Ltd and Others [2016] EWHC 523 (Ch), Ch D (refd)

Ebrahimi v Westbourne Galleries Ltd and others [1972] 2 All ER 492, HL (refd)

Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ors and another appeal [2013] 2 MLJ 297; [2013] CLJ 277, FC (folld)

Ng Hong Chai v Teoh Ah Kow [1999] MLJU 769; [2000] 5 CLJ 175, HC (refd)

O'Neill and another v Philips and others [1999] 2 All ER 961, HL (refd)

Yai Yen Hon & Ors v Lim Mong Sam @ Lim Ah Tee [1997] 2 MLJ 190; [1997] 2 CLJ 812, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 181, 181(1)(a), 218(1)(i)

Valuers, Appraisers and Estate Agents Act 1981

Appeal from: *ISM Sdn Bhd v Queensway Nominees (Asing) Sdn Bhd & Ors and other suits* [2021] 7 MLJ 506 (High Court, Kuala Lumpur)

Gopal Sreenevasan (with Celine Chelladurai, Michelle Chew, Melody Tan Kar Yen and Kelviin Manuel Pillay) (Celine & Oommen) for the appellants.
Cecil Abraham (with Sunil Abraham, Mohd Irwan bin Ismail, Polwin Sua Shiang Nian and Yap Jing Wen) (Cecil Abraham & Partners) for the respondent.

Mariana Yahya JCA:

INTRODUCTION

[1] The present Civil Appeal No W-02(NCC)(W)-1220–07 of 2019 ('Appeal 1220') and Civil Appeal No W-02(NCC)(W)-1341–07 of 2019 ('Appeal 1341') are related appeals. Both appeals arise from the judgment of the High Court dated 21 June 2019.

[2] The appellants ('the defendants') in Appeal 1220 are appealing against the whole decision of the High Court in allowing the respondents (ISM Sdn Bhd — the plaintiff) in five civil suits filed pursuant to s 181 of the Companies Act 1965 which were later consolidated into one suit. The five civil suits at the High Court namely:

(a) WA-22NCC-68–02 of 2016;

(b) WA-22NCC-69–02 of 2016;

(c) WA-22NCC-70–02 of 2016;

(d) WA-22NCC-71–02 of 2016; and

(e) WA-22NCC-72–02 of 2016;

[3] Whereas the appellant (ISM Sdn Bhd — the plaintiff) in Appeal 1341 filed an appeal against part of the High Court's decision that allowed only part of the damages sought by ISM in the statement of claim. ISM Sdn Bhd appeals on the remaining reliefs that were not granted by the learned High Court judge as follows;

(a) reliefs in the amended statement of claim in paras 250(2), (3), (4)(a) and (b), 5(a) and (b), 6 (a, b, c and d), 7 (a, b, c, d and e) and 9(c) in KLHC Suit WA-22NCC-68–02 of 2016 (Suit No 68) are not granted and dismissed;

(b) reliefs in the amended statement of claim in paras 250(2), (3), (4)(a) and (b), 5 (a, b, c and d), 6 (a, b, c, d and e), and 8(c) in (c) in KLHC Suit WA-22NCC-69–02 of 2016 (Suit No 69) are not granted and dismissed.

(c) reliefs in the amended statement of claim in paras 250(2), (3), (4)(a) and (b), 5 (a and b), 6 (a, b, c and d), 7(a, b, c, d and e) and 9(c) in KLHC Suit

WA-22NCC-70–02 of 2016 (Suit No 70) are not granted and dismissed;

(d) reliefs in amended statement of claim in paras 250(2) (a), (3) (a, b, c and d), (4)(a, b, c, d and e), and 6(c) in KLHC Suit WA-22NCC-71–02 of 2016 (Suit No 71) are not granted and dismissed;

(e) reliefs in the amended statement of claim in paras 250(2), (3), (4) (a, b, c, d and e) and 6(c) in KLHC Suit WA-22NCC-72–02 of 2016 (Suit No 72) are not granted and dismissed;

(f) the buy-out price is to be determined by the independent firm of accountant and independent firm of valuers in accordance with Valuers, Appraisers and Estate Agents Act 1981; and

(g) damages, interest, and costs as mentioned in paras 6 to 16 of the notice of appeal.

PRELIMINARY OBJECTION BY THE RESPONDENT

[4] Before the appeals were heard, the respondent raised a preliminary objection on two points:

(a) first, the appeal is entirely based on the High Court's decision in allowing the respondent's claim under s 181 of the Companies Act 1965 ('the CA 1965'). Nothing in the memorandum of appeal or additional memorandum of appeal mentioned about the appeal on the dismissal of the appellants' counterclaim. The appellants have to state clearly about the counterclaim in the notice of appeal and memorandum of appeal; and

(b) second, the damages that the learned High Court judge awarded were made without hearing evidence from witnesses and/or parties' submissions. Therefore, the learned High Court judge was wrong in deciding on damages.

In response to the respondent's preliminary objection, the appellants submitted that their appeal is on the whole decision of the High Court and it includes the dismissal of counterclaim by the learned High Court judge.

OUR RULING ON THE PRELIMINARY OBJECTION

[5] Upon hearing submissions by the parties, it is our considered view that the notice of appeal only mentioned *'appeals to the Court of Appeal against the whole decision of the said decision in allowing the plaintiff's claim pursuant to s 181 of the Companies Act 1965'*. Our reading of the quoted words is that the appellants have been limited to the decision in respect of the claim of the

respondent that has been allowed only. The subject of appeal is ambiguous in which case, the respondent should not be put in a position to defend the counterclaim. Accordingly, we ruled that the decision of the High Court on the counterclaim cannot be pursued in this appeal. As for the second point of the preliminary objection, we shall consider the argument with the main argument at the end of the appeal. (Emphasis added.)

[6] Based on our ruling on the respondent's preliminary objection, for the purpose of this appeal, we only confine ourselves to the appellants' appeal in allowing the respondent's claim under s 181 of the CA 1965.

[7] In the light of the above, both the parties herein agreed to the following relating to the conduct of both appeals as follows:

(a) both Civil Appeal No W-02(NCC)(W)-1220–07 of 2019 and W-02(NCC)(W)-1341–07 of 2019 be heard together; and

(b) a single record of appeal be filed in respect of both Civil Appeal No W-02(NCC)(W)-1220–07 of 2019 and W-02(NCC)(W)-1341–07 of 2019.

In the circumstances, pursuant to the agreement between the parties, the record of appeal filed in respect of Appeal 1220 shall be used for both Appeal 1220 and Appeal 1341. Therefore, reference to the record of appeal, unless stated otherwise, shall be references to the record of appeal filed in Appeal 1220.

[8] For ease of reference in this appeal, parties will be referred to as they were in the High Court.

SALIENT FACTS

As parties are fully aware of the facts of this case, only when it is necessary will the same be referred to hereafter. We shall adopt the background facts of the case as stated by the learned High Court judge in His Lordship's grounds of judgment with some modifications if necessary.

[9] The plaintiff, ISM Sdn Bhd ('ISM') was owned by Dato' Ray Cheah and his wife, Datin Teoh. They were also its directors. Dato' Ray Cheah was a property investor, property consultant, and registered valuer with a considerable number of years of experience.

[10] Dato' Ray Cheah was approached in June 2006 to assist in the rehabilitation of an abandoned project located at the junction of Jalan Imbi

and Jalan Sultan Ismail called 'CN Gallery'. The property sat on two pieces of land, Lots 1282 and 1283 ('CN lands'). The proprietor of the CN lands was a company that had obtained credit facilities from a wholly-owned subsidiary of MPHB Capital Bhd ('MPHB'). A

[11] Dato' Ray Cheah testified that he considered the abandoned development on the CN lands was too small to be developed into a mixed-use commercial development of significant value, but that, because of its prime central location, it and the lots adjoining them could be turned into a large-scale integrated commercial development. He conceived a plan by which the adjoining lots could be acquired and developed on an integrated basis, referred to here as the 'Imbi project'. B C

[12] Dato' Ray Cheah was however informed that MPHB was about to acquire the abandoned project. As part of the debt repayment process, the CN lands were eventually sold to MP Factors Sdn Bhd (MPFSB), a wholly-owned subsidiary of MPHB Capital Bhd ('MPHB'). D

[13] Dato' Ray Cheah decided to approach MPHB as one of the possible parties to implement the Imbi project. He knew that MPHB had significant cash resources to fund such a project. When he outlined his concept for the Imbi project to Madam Kheoh And Yeng ('Madam Kheoh'), MPHB's chief operating officer, Madam Kheoh told him that 'it would have been impossible for any party to acquire all the lots' for the Imbi project. E F

[14] Despite her apparent initial misgivings, Madam Kheoh became quite interested in the project. Dato' Ray Cheah presented a feasibility study to Tan Sri Surin Upatkoon, who is the managing director of MPHB and also its single largest shareholder, and Madam Kheoh, following which MPHB agreed to participate in the Imbi project. G

[15] Five different companies which are Queensway Nominees (Asing) Sdn Bhd ('QNA'), Queensway Nominees (Tempatan) Sdn Bhd ('QNT'), West-Jaya Sdn Bhd ('WJSB'), Mulpha Kluang Maritime Carriers Sdn Bhd ('MKMC') and Leisure Dotcom Sdn Bhd ('LDC') were incorporated as joint venture company ('JV companies') for the purpose of acquiring land for pursuing the Imbi project. The five different companies were used in order that the acquisitions be carried out in a discreet manner and without alerting the owners of the individual lots that there was a single purchaser that was proposing to amalgamate the lots into a single development. If that information had gone into the public domain, the whole project may run the risk of being held to ransom by a single owner. This strategy was undertaken upon Dato' Ray Cheah's advice. H I

A **[16]** It was common ground between the parties that there existed an agreement between MPHB and ISM regarding the joint venture undertaken for the Imbi project. It was also not in dispute that the parties agreed that ISM would hold 30% of the equity in the JV companies, while MPHB would hold the remaining 70%.

B

[17] From 2006 until 2012, a number of different properties were acquired over the course of several years in pursuit of the Imbi project. They were CN Lands (Lot 1282 and Lot 1283), Lot 646, Lot 1216 ('De Vegas land'), Lot 642, Lot 200, Lot 1286, Lot 637, Lot 643, Lot 644, Lot 1199 and Lot 634.

C

[18] In all, eleven separate plots of land were acquired, two of which were held by entities outside the joint venture, Caribbean Gateway Sdn Bhd ('CG') and MP Factor Sdn Bhd. It was clear that the involvement of ISM was key and central to the acquisition of the Imbi lands, even in instances where the land acquired was eventually held by companies wholly owned by MPHB. It was also clear that the work involved in accumulating the lands was not insubstantial; much effort and perhaps some guile were required over the course of several years in order to acquire the various plots.

D

E

[19] In the meantime, beginning sometime in 2009, the parties had been exploring plans for the development of the Imbi project. Consultants were engaged. Reports were prepared. One of the proposals entailed the use of Caribbean Gateway Sdn Bhd as the entity to hold all the lands held by Queensway Nominee (Asing), Queensway Nominee (Tempatan), and West Jaya Sdn Bhd. The acquisitions by the other JV companies had not yet been completed at this time. It was also contemplated that Caribbean Gateway Sdn Bhd would obtain external financing in the form of bank loans in order to finance the acquisition of the lands.

F

G

[20] Even though this corporate exercise did not materialise, Caribbean Gateway nonetheless proceeded to obtain and draw down upon, four loans from Malayan Banking Bhd. Although the stated purpose of the loans was to finance the acquisition of the lands held by the relevant JV companies at that time, Caribbean Gateway never in fact acquired the lands from the JV companies. Instead, the proceeds of the Maybank loans were on-lent to the JV companies, which then used the proceeds to repay the shareholder advances made to the JV companies by MPHB.

H

I **[21]** The parties later sought to formalise their relationship by negotiating a shareholders' agreement. A draft shareholders' agreement was circulated by MPHB to ISM on 24 July 2009. This draft was prepared based on the corporate proposal involving Caribbean Gateway Sdn Bhd as the joint venture entity, which was to acquire separate lots of land from each JV company.

Nevertheless, this proposal never eventuated. A

[22] The plaintiff did not raise any major objections to the terms of this first draft shareholders' agreement. In fact, in the course of the trial, Dato' Ray Cheah conceded that he considered the plaintiff to be bound by the terms of the first draft shareholders' agreement, save for cl 12.4 (which provided that the shareholders' agreement did not constitute a partnership between the parties). B

[23] It was only eight months later, in March 2010, that Dato' Ray Cheah responded to the first draft shareholders' agreement. He did so by proposing an entirely new draft shareholders' agreement, rather than providing comments to the original draft provided by MPHB. No formal shareholders' agreement was ever signed and executed between the parties. C

[24] Although there was no formal shareholders' agreement entered into between ISM and MPHB, it was the common position of the parties that they were bound by the terms of an oral agreement between them. The precise terms of this oral agreement were a matter of some dispute. D

[25] The core of the dispute between the parties surrounded the obligations of the respective parties to provide funding to the JV companies in order for them to acquire the land in pursuit of the Imbi project. E

[26] The plaintiff's position was that the funding for the JV companies was to be divided into a cash portion and a loan portion, apportioned on a 30:70 basis. Of the cash portion, plaintiff would be liable to contribute 30% (in other words, 30% of 30%, or 9% of the total funds required in respect of each JV company). Meanwhile, MPHB would be liable to contribute 70% of the cash portion, and would also be liable to fund the entire loan portion, at a rate of interest of 8%pa. In other words, MPHB (according to the plaintiff) was liable to contribute 91% of the total funding required by each JV company for the acquisition of the lands. F G

[27] By contrast, MPHB asserted that funding for the JV companies was to have been provided in proportion to their agreed equity interests, ie on a 70:30 basis. This dispute was later caused plaintiff to file five originating summons alleging minority oppression under s 181 of the Companies Act 1965 against the defendants. As some of the issues in dispute turned on proof of the disputed terms of an oral shareholders' agreement, the suit was converted to a writ and the affidavits filed were converted into pleadings. H I

[28] The learned counsel for the plaintiff advanced 25 separate instances of oppressive conduct, which the learned High Court judge later grouped into five broad areas:

(a) the demand by MHPB on 25 June 2015 that plaintiff should contribute 30% of the purchase price for the De Vegas land that Leisure Dotcom Sdn Bhd acquired. The plaintiff argued that this request for a contribution of 30% of the purchase price was not in accordance with the practice of the joint venture previously, where plaintiff was required to contribute 30% of the cash portion or 9% of the total acquisition cost of each property acquired under the joint venture. It was alleged the insistence by MPHB that plaintiff contributes 30% to the total funding requirement for Leisure Dotcom Sdn Bhd amounted to actionable oppression and unfair prejudice under s 181 of the Companies Act 1965;

(b) the rights issues undertaken by Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd, and Mulpha Kluang Maritime Carriers Sdn Bhd. MPHB had caused each of QNA, QNT, and MKMC to undertake a rights issue exercise, in the case of MKMC, MPHB's interests were held through Multi-Purpose Shipping Corporation Bhd, a wholly-owned subsidiary of MPHB. These rights issue exercises had the effect of diluting plaintiff's holdings in the three JV companies from 30% to fractions of one percent. In each case, the rights issue did not raise any fresh capital for the relevant JV company but was affected by way of capitalisation of intercompany debt. The plaintiff did not take up its entitlements under the rights issue exercises by the relevant JV companies. The plaintiff's position was that it did not have the resources to do so. It was advanced for the plaintiff that, among others, these rights issue exercises, and the manner in which they had been carried out constituted oppression of the plaintiffs rights as a shareholder in the relevant JV companies and were in disregard of such rights;

(c) the imposition of interest on the shareholder advances made by MPHB for the cash portion of the funding to the JV companies. The plaintiff contended that the terms of the agreement between the parties were that the funding for the JV companies was to be divided into a cash portion and a loan portion, apportioned on a 30:70 basis. On the cash portion, plaintiff would be liable to contribute 30% (in other words, 30% of 30%, or 9% of the total funds required in respect of each JV company). The plaintiffs position was that MPHB would be liable to contribute 70% of the cash portion, and would also be liable to fund the entire loan portion, at a rate of interest of 8%pa, in other words, MPHB (according to the ISM) was liable to contribute 91% of the total funding required by each JV company for the acquisition of the lands. The plaintiffs position was that the cash portion was not to bear interest. It was, in other words, to be treated as quasi-equity. The defendants, for their part, denied that this was the case, citing the fact that the listing requirements of Bursa Malaysia and the relevant transfer pricing guidelines would have prevented MPHB from lending to a subsidiary or related company

without charging interest. From 2007, no interest was charged on the cash portion advanced by both shareholders to Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd, and West-Jaya Sdn Bhd. Interest was paid rateably to both shareholders in respect of the cash portion advanced to Leisure Dotcom Sdn Bhd. However, from 2010 onwards, MPHB caused the JV companies to pay interest to itself on the cash portion of the advances made by MPHB, but not the cash portion advanced by the plaintiff. Among the contentions put forward by the plaintiff was that the differing treatment regarding interest on the cash portion advanced by the respective shareholders justified a finding of oppression of the rights of plaintiff as shareholder in all of the JV companies and of unfair discrimination against it;

(d) the refusal to re-elect Dato' Ray Cheah as a director of the five JV companies. Dato' Ray Cheah was not initially a director of any of the JV companies. Plaintiff was represented on the board of Queensway Nominees (Asing) Sdn Bhd and Queensway Nominees (Tempatan) Sdn Bhd by Dato' Ray Cheah's wife, Datin Teoh, whereas it had no representative on the boards of the other JV companies. After the parties fell into dispute, Dato' Ray Cheah obtained a seat on the board of all the JV companies, after he had made such a request following receipt of the notices for the extraordinary general meetings where the rights issue was to be considered and voted upon. Dato' Ray Cheah requested for the financial records and supporting documents of the JV companies, in his capacity as director of the companies. On 15 June 2015, the financial documents of the JV companies were made available to him, but without supporting documents. Just two days later, the annual general meetings of the JV companies were held where Dato' Ray Cheah was not re-elected as a director. On the very next day, 18 June 2015, the company secretary to the JV companies informed plaintiff that, because Dato' Ray Cheah was no longer a director of the companies, the corporate records would not be made available for his inspection. It was contended by the plaintiff that the refusal by the directors of the JV companies to re-elect Dato' Ray Cheah as a director of the JV companies amounted to oppression of its rights as a shareholder; and

(e) the transfer of one share in each of Leisure Dotcom Sdn Bhd, Mulpha Kluang Maritime Carriers Sdn Bhd and West Jaya Sdn Bhd to Jayavest Sdn Bhd. In October and November 2014, MPHB transferred one share in each of Leisure Dotcom Sdn Bhd, Mulpha Kluang Maritime Carriers Sdn Bhd, and West Jaya Sdn Bhd to its subsidiary company, Jayavest Sdn Bhd. This was after the dispute regarding Leisure Dotcom Sdn Bhd had arisen, but before the rights issue exercises were undertaken. At trial, a witness for MPHB conceded that the reason for the introduction of Jayavest Sdn Bhd as a shareholder was to ensure that the general meetings of the relevant JV companies would not fail for want of quorum if

A plaintiff did not attend any such meeting called. It was contended that the transfer of such shares constituted oppression of plaintiff's rights as shareholder in the relevant JV companies.

B **[29]** The other issues which were also in dispute before the High Court include:

(a) whether a quasi-partnership existed between the parties in respect of the JV companies;

C (b) whether the terms of the oral joint venture agreement were valid;

(c) whether the plaintiff could sustain a claim for oppression on a purported breach of a shareholders' agreement; and

(d) whether the case for oppression was made out.

D **[30]** The plaintiff further claimed that the directors of the JV companies who were nominated by MPHB had acted for an improper purpose and in breach of their fiduciary duty by suppressing documents or failing to provide adequate disclosure of information to plaintiff in connection with the rights issue.

E

[31] The plaintiff also claimed general, exemplary and punitive damages.

[32] The defendants counterclaimed and sought a declaration that the joint F venture arrangement had been terminated by reason of plaintiff's breach of its obligations to contribute 30% of the total funding required by all five JV companies. It also further sought to recover interest on 30% of the Maybank loans and the opportunity costs on 70% of the interest paid to Maybank for the Maybank loans.

G

[33] On 21 June 2019, the High Court allowed the plaintiffs claim in part and dismissed the defendants' counterclaim. The High Court further directed that plaintiffs minority stakeholder in the JV companies be bought out by the majority shareholder, MPHB.

H

AT THE HIGH COURT

[34] It is pertinent to note that prior to the commencement of the trial at the High Court, parties have agreed that the trial would be bifurcated into separate I liability and damages proceedings as follows:

(a) the first part would be in respect of liability whether there was oppression pursuant to s 181 of the CA 1965; and

(b) the second part of the trial in respect of the remedies is to be ordered

depending on the outcome of the first part.

At the end of the trial, the learned High Court judge made his finding on liability together with damages.

FINDINGS BY THE LEARNED HIGH COURT JUDGE

[35] The learned High Court judge in para 131 of His Lordship's grounds of judgment made his finding that the claim for oppression and unfair prejudice had been made out for oppression and unfair prejudice based on three different and independent bases as below:

(a) that the JV companies were quasi-partnership;

(b) on the basis that the acts complained of contravened the terms of the oral shareholders' agreement between MPHB and ISM; and

(c) in connection with the differing treatment of interest on the cash portion, even without regard to whether the JV companies were quasi-partnership or whether there existed a shareholders' agreement between ISM and MPHB.

[36] Further, the learned High Court judge in paras 132 to 176 of His Lordship's grounds of judgment made his findings on the five broad areas of the complaints on the oppressive conduct by the defendants against the plaintiff. They are as follows:

(a) on the issue of the demand by MHPB dated 25 June 2014, plaintiff contributes 30% of the purchase price for the De Vegas land that Leisure Dotcom Sdn Bhd acquired. In April 2007, plaintiff entered into a contract to purchase the De Vegas Land on behalf of the joint venture. Two months later, Leisure Dotcom Sdn Bhd entered into a formal SPA with the vendor of De Vegas Land. Leisure Dotcom Sdn Bhd fell into dispute following which Leisure Dotcom Sdn Bhd sued the vendor of De Vegas Land for specific performance and on 25 June 2014 the Court of Appeal granted judgment for Leisure Dotcom. On 25 June 2014, MPHB sent an email to plaintiff demanding the RM19,483,740 being a 30% share of the balance purchase price owed by plaintiff to enable MPHB to issue the full payment of RM64,945,800 in a single bank draft. This demand contradicts the previous JV where the plaintiff was required to only contribute 30% of the cash portion or 9% of the total acquisition cost of each property acquired under the joint venture. In November 2014, plaintiff through Dato' Ray Cheah, made a payment of RM400,000 to MPHB for the outstanding cash portion together with interest by way of bankers' cheques and unfortunately, the cheques were rejected by MPHB. The learned High Court judge found that the

conduct of MPHB and Leisure Dotcom in insisting on a 30% contribution of the total acquisition price for the De Vegas Land coupled with the rejection of bankers' cheques for the 30% contribution to the cash portion constituted conduct that was oppressive of plaintiff as a shareholder in Leisure Dotcom Sdn Bhd and in disregard of its interest as such a shareholder. On the basis that each of the JV companies was a quasi-partnership, it would not have been open to MPHB to unilaterally dictate to plaintiff how much it ought to contribute to the funding requirements of Leisure Dotcom Sdn Bhd;

(b) the rights issue of shares undertaken by Queensway Nominees (Asing Sdn Bhd), Queensway (Tempatan) Sdn Bhd, and Mulpha Kluang Maritime Carriers Sdn Bhd and the manner how those rights issues were carried out (involving the capitalisation of intercompany debt due to MPHB) which had the effect of diluting plaintiff holdings in each of these JV companies from 30% to fraction of 1%. On this issue, the learned High Court judge found that the nature of the relationship of mutual trust and confidence between plaintiff and MPHB, it would not have been open to MPHB to carry out an exercise to increase the share capital of the JV companies by the rights issue without the assent and approval of plaintiff. Such an exercise could only be described as a betrayal of the mutual trust that had underpinned the relationship between them. The right issue was prejudiced to plaintiff, for it had resulted in a dilution of plaintiff's interest from 30% to fractions of 1%. Even assuming the JV companies in question were not quasi-partnerships, the rights issue exercises would have breached the terms of the oral agreement between plaintiff and MPHB that the shareholding proportions would be maintained at a 30:70 ratio. The manner in which the exercises were carried out contravened the oral agreement, even if plaintiff possessed the financial wherewithal to take up its rights entitlements. This has caused prejudice to plaintiff because it would have had to inject fresh funds into the affected JV companies simply to maintain the shareholding ratio of 30:70;

(c) the imposition of interest on the shareholder advances made by MPHB for the cash portion of the funding to the JV companies. ISM's position was that the cash portion was not to bear interest. Queensway Nominees denied that this was the case citing the fact that the listing requirements of Bursa Malaysia and the relevant transfer pricing guidelines would have prevented MPHB from lending to a subsidiary or related company without charging interest. From 2007, no interest was charged on the cash portion advanced by both shareholders to Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd, and West-Jaya Sdn Bhd. From 2010 onwards, MPHB caused the JV companies to pay interest to itself on the cash portion of the advances made by MPHB, but not the cash portion advanced by plaintiff. There

was no reasonable justification why there had been a different treatment regarding interest on the cash portion advanced by the respective shareholders, which of itself justified a finding of oppression of the rights of ISM as shareholder in all of the JV companies, of unfair discrimination against it and or disregard of plaintiffs rights qua shareholder. This conclusion was not predicated on either a finding that the JV companies were quasi-partnerships or Ebrahimi-type companies, or that the conduct complained of amounted to a breach of the terms of the oral joint venture agreement between them. The refusal to provide financial information to a shareholder when the joint venture company in question was a quasi-partnership would also justify a finding of shareholder oppression. The way in which MPHB had caused the JV companies had been conducted and this in turn prevented ISM from discovering the unequal treatment of the shareholder advances. The learned High Court judge found that the refusal by the directors of the JV companies to re-elect Dato' Cheah as a director of the JV companies does not change the fundamental basis of the relationship, which was that all or all major decisions affecting the JV companies could only have been made and implemented with the concurrence of both plaintiff and MPHB;

(d) the transfer of one share in each of Leisure Dotcom Sdn Bhd, Mulpha Kluang Maritime Carriers Sdn Bhd, and West-Jaya Sdn Bhd to Jayavest Sdn Bhd (which was another company in the MPHB group of companies) in order to fulfill quorum requirements for shareholders meetings. The learned High Court judge was of the view that the transfer of the one share was not oppressive to the plaintiff or prejudicial to its interest. It was not the transfer of one share in the relevant JV companies that was objectionable, but rather the rights issue proposal was forced through the general meetings in the face of objections by the plaintiff; and

(e) plaintiff also claimed that the directors of the JV companies who were nominated by MPHB had acted for improper purpose and in breach of their fiduciary duty by suppressing documents or failing to provide adequate disclosure of information to the plaintiff in connection with the right issue. For this complaint, the learned High Court judge dismissed plaintiffs claim to make the directors personally liable.

[37] The learned High Court judge also allowed damages for the plaintiff.

[38] After trial, the learned High Court judge decided with the following orders:

1. The Plaintiff's claim for oppression has been made out;

2. The second defendant (as the majority shareholder) is to buy out the Plaintiff's 30% share in Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd and Mulpha Kluang Maritime Carriers Sdn Bhd prior to the dilution of the Plaintiff's shareholdings in these companies, and the Plaintiff's 30% shares in Leisure Dotcom Sdn Bhd and West-Jaya Sdn Bhd;

3. The buyout price to be determined by an independent firm of accountants by taking into account the land valuations of all the lands owned by Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd, West-Jaya Sdn Bhd, and Leisure Dotcom Sdn Bhd, Lots 1286 and Lot 634 owed by Caribbean Gateways Sdn Bhd, Lot 1282 and Lot 1283 owned by MP Factor Sdn Bhd and the state lands in the Jalan Imbi area to reflect the Imbi Lands as being an integral part of the Imbi project, and enjoys the development value and benefits of the Imbi project as a single integrated project, and after that deducting from the whole vaiue attributed to the Lands held by MP Factor Sdn Bhd and Caribbean Gateways Sdn Bhd namely Lots 1286 and Lot 634 owned by Caribbean Sdn Bhd, Lot 1282 and Lot 1283 owned by MP Factor Sdn Bhd, and the state lands as determined by an independent valuer licensed under the Valuers, Appraisers, Estate Agents, and Property Managers Act 1981;

4. The identities of an independent firm of accountants and the firm of valuers are to be determined by agreement between the parties within 30 days from 21 June 2019;

5. If parties fail to mutually agree on the identities of the firm of accountants and firm valuers, they will each nominate their chosen 3 firms of accountants and 3 firms of valuers to the Court within a further period of 30 days;

6. The Court will then appoint a firm of accountants and a firm of valuers from the parties' nomination;

7. The basis of the valuation of the lands will be determined by an independent firm of valuers based on what they consider to be the most appropriate method or methods. The determination of the buyout price by the independent firm of accountants will be binding on the parties.

8. Upon determination of the identity of the firm accountants and the firm of valuers, their proposed terms of engagement will be reviewed by the Court;

9. The Plaintiff and the second Defendant are to mutually execute the terms of engagement of the firm of accountants and the firm of valuers and shall equally bear the costs of the accountant and valuer;

10. A draft valuation report will be given to the parties for parties to comment on, in accordance with a deadline by the court. Comments by the parties shall be considered by the firm of accountants and the firm of valuers in finalising their reports but without affecting their independence and discretion to make the determination of the final vatue;

11. Interest on the buy-out consideration will accrue at the rate of 5% per annum from the date expiring 7 days from the date of the final determination of the by-out price by the independent firm of accountants until full payment;

12. RM10,000.00 is allowed as nominal damages to the Plaintiff, and the sum of RM10,000.00 is to be paid to the Plaintiff with an interest of 5% per annum to be calculated from 22.6.2019 until the date of full and final settlement;

13. The Plaintiff's claim for punitive and exemplary damages in all 5 suits is dismissed;

14. Costs of RM100,000.00 to be paid to the Plaintiff, subject to an allocator;

15. The Defendants' counterclaim in all the 5 suits are dismissed;

16. For those companies which had conducted the right issue exercise, the date of valuation shall be as of 1 day prior to the passing of the vote at the Extraordinary General Meeting for the right issue for Queensway Nominees (Asing) Sdn Bhd (i.e. 5.4.2015), Queensway Nominees (Tempatan) Sdn Bhd (i.e. 5.4.2015), and Mulpha Kluang Maritime Carriers Sdn Bhd (i.e. 4.3.2015);

17. The date of valuation for those companies which had not conducted the rights issue exercise, which are West-Jaya Sdn Bhd and Leisure Dotcom Sdn Bhd shall be on 21 June 2019;

18. The buy-out price for the Plaintiff's 30% share in Leisure Dotcom Sdn Bhd is to deduct the balance payable by the Plaintiff amounting to RM4,329,720.00 in respect of the Plaintiff's share of the purchase price for the De Vegas Land (Lot 1216);

19. Both parties are given liberty to apply.

[39] Dissatisfied with the learned High Court's decision, the defendants appealed to the said decision. Hence, the present appeal to this court.

OUR ANALYSIS AND FINDINGS

For the purpose of this appeal, we shall first deal with Appeal 1220.

[40] The plaintiff's claim is premised on s 181 of the Companies Act 1965. Plaintiff claims that it was oppressed as a minority shareholder by MPHB as the majority shareholder and the directors of the five companies where plaintiff and MPHB have shareholdings in the ratio of 30%:70% respectively. The centric issue in this appeal is whether the learned High Court judge has rightly in law and fact found that the case for oppression had been made out against the defendants within the meaning of s 181 of the CA 1965.

[41] Section 181 provides as follows;

181 *Remedy in cases of an oppression*

(1) Any member or debenture holder of a company may apply to the Court for an order under this section on the grounds —

(a) *that the affairs of the company are being conducted or the powers of the*

directors are being exercised in a manner oppressive to one or more of the members or debenture holders including himself or in disregard of his or their interests as members, shareholders, or debenture holders of the company; or

(b) that some act of the company has been done or is threatened or that some *resolution of the members, debenture holders, or any class of them has been passed or is proposed which unfairly discriminates against* or is otherwise prejudicial to one or more of the members or debenture holders, including himself.

(2) If on such application the Court is of the opinion that either of those grounds is established, the Court may make such order as the Court thinks fit with the view to bringing to an end or remedying the matters complained of, and without prejudice to the generality of subsection (1), the order may —

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in the future;

(c) provide for the purchase of the shares or debentures of the company by other members or debenture holders of the company or by the company itself; (d) in the case of a purchase of shares by the company, provide for a reduction accordingly of capital of the company; or

(d) provide that the company be wound up.

(3) If an order that the company be wound up is made under paragraph (2)(e), the provisions of this Act relating to winding up of a company shall apply as if the order had been made upon a petition duly presented to the Court by the company.

(4) Where an order under this section makes any alteration in or addition to any constitution, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the order, but subject to the foregoing provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

(5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days from the making of the order. (Emphasis added.)

[42] The statute provides that what is actionable is the 'affairs of the company', not the 'affairs of the shareholders'. For the plaintiff to succeed in its claim, the plaintiff has to establish two things within the companies in which the plaintiff has a shareholding:

(a) first, *the affairs of the five companies*, namely Queensway Nominees (Asing), Queensway Nominees (Tempatan), Mulpha Kluang Maritime Carriers Sdn Bhd, Leisure Dotcome Sdn Bhd and West-Jaya Sdn Bhd *are being conducted in a manner oppressive of the plaintiff*; or

(b) second, *the powers of the directors* of five companies as mentioned above are being conducted oppressively to the plaintiff.

[43] Based on the plaintiffs pleadings, the 'affair' being complained of, relates to the joint venture which comprises the acquisition of lands, the grouping of these lands into a single entity, the preparation of development plans and obtaining of development order ie phase 1 and phase 2 would be 'the venture' agreed between parties. Thus, the venture relates entirely to the unincorporated joint venture or, potentially Caribbean Gateway ('CG'). The facts of the case clearly showed that the five companies were mere vehicles to obtain the land anonymously and the lands were always intended to be moved into the venture entity and this was admitted by Dato' Ray Cheah in his evidence.

[44] There are lands held solely by MPHB (MP Factors and CG Lands) that are pivotal to the venture and thus can only be part of the venture once all the lands are moved into the venture entity. In fact, all the development plans and engagement of experts for the development were done through CG. In short, all plans and discussions were undertaken at CG management meetings and there were never any meetings or discussions in the five companies. Not only that, all the loans from Maybank including the short-term intercompany loan for funding of working capital for the development plans of the venture were also taken through CG.

[45] It is pertinent to note that the MPHB draft shareholders' agreement was prepared in July 2009 in respect of CG that reflects the terms of the joint venture agreement in respect of acquiring the lands, the shareholding structure reflecting the value of payment for the lands, preparing the development plans and planning permissions and thereafter developing the same. Dato' Ray Cheah in his evidence affirmed that plaintiff is bound by the terms of the MPHB draft shareholders agreement.

[46] There was a shareholders' agreement prepared in respect of CG stating clearly the parties' interest in the venture and what the duties and responsibilities of the parties would be under the agreement. Dato' Ray Cheah in his evidence had admitted that CG was the beneficial owner of all the lands and even the plaintiffs shareholders' agreement related to CG and not the five companies. Suffice it to say that all affairs of the venture were run through CG and this can be seen from Dato' Ray Cheah's evidence with regard to what the venture was, is very revealing that the joint venture entity was always meant for CG. In such circumstances, plaintiffs contention that CG would only have a notional role in the venture is misconceived. We agree with the appellants' counsel submission that the joint venture remains an unincorporated joint

venture and there is no joint venture term that is applicable to the five companies.

[47] Premised on all the above, it is abundantly clear that the joint venture entity is not the five companies but rather, CG. All in all, the joint venture remains an unincorporated joint venture and as mentioned earlier, there is not even a joint venture term that is applicable to the five companies. Consequently, there is no 'affair' or business that vests in these five companies. Additionally, there is no abuse or oppression can arise in these five companies.

[48] The learned High Court judge in His Lordship's grounds of judgment in para 63(b) at line 18 from above, agreed that there was never any 'affairs' or business in these five companies. Paragraph 63(b) reads:

> 63(b) ...
>
> For this reason, I was unable to agree with the contention of the defendants that it was they who took the lead in managing the affairs of the JV companies. *There was nothing for them to 'manage'. The JV companies were no more than shell entities incorporated for the primary purpose of holding the real properties to be acquired.* (Emphasis added.)

[49] The learned High Court judge's finding on the principles applicable to s 181 of the CA 1965, when applied to the facts of the present case, clearly shows that there were no 'affairs' and 'ventures' within the five companies. Thus, it is our considered view that based on this premise alone, the learned High Court judge's finding on oppression within the meaning of s 181(1)(a) of the CA 1965 is wrong in law and fact and is therefore unsustainable. We agree with the defendants' counsel submission that there cannot be any claim premised on s 181 of the CA 1965 in respect of the five companies. The plaintiffs claim if any, would lie in respect of a purported breach of a term of an agreement in respect of an unincorporated joint venture.

[50] In furtherance, the learned High Court judge in paras 62 to 72 of His Lordship's grounds of judgment made the findings on quasi-partnership on the following grounds:

(a) the agreement was verbal and not reduced in writing. There was mutual confidence and trust that even though a draft agreement had been prepared, the parties proceeded with their relationship;

(b) the relationship was the basis of consensus with the tactical acquisition of target lands led by the defendant and the funder with deep pockets, MPHB;

(c) MPHB had referred to Dato' Ray Cheah as a 'partner' to third parties at meetings; and

(d) there was a great deal of trust and confidence between Madam Kheoh and Dato' Ray Cheah which was not entirely commercial and at arm's length.

The abovementioned reasons given by the learned High Court judge suggest that the plaintiff was in a quasi-partnership with MPHB.

[51] It is the plaintiffs (Dato' Ray Cheah) pleaded case that the relationship that existed between parties is one of a quasi-partnership. On the contrary, the defendants denied this and stated that the relationship of the parties is only to be treated as an unincorporated joint venture at arm's length ie a pure corporate venture.

[52] It is trite that 'just and equitable principles' can only be applied in cases for minority oppression under s 181 of the CA 1965 where the company is a quasi-partnership, and not in any other circumstance (see Federal Court decision in *Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ors and another appeal* [2013] 2 MLJ 297; [2013] CLJ 277). Further, the Federal Court in the *Jet Tech* case also held that if a party intends to rely on a shareholder's agreement (which is in this case) and not the memorandum and articles of association ('M&A') to establish that the conduct was unjust and inequitable and thus the company ought to be wound up, reliance ought to be placed on s 218(1)(i) of the CA 1965 and not s 181 of the same Act. In para 37 of the said judgment, Raus Sharif PCA (as he was then) stated the following;

> [37] It was alleged by the appellants that Yushiro's conduct in refusing to allow to remove Gam and Firdaos as directors of the company amounted to a breach of the shareholders agreement. In this regard, we are in agreement with the submission of learned counsel for the respondents that breached of a shareholders' agreement cannot be a basis for bringing a petition under s 181. *A complaint under s 181 of the CA must be confined to matters relating to the affairs of the company. Shareholders' agreement and breach of the same clearly are not matters relating to the affairs of the company. They are private matters enforceable by the parties to the shareholders' agreement.* (See *Beh Chun Chuan v Paloh Medical Centre Sdn Bhd & Ors* [1999] 3 MLJ 262; [1997] 7 CLJ 1, *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661; [1996] 1 CLJ 393 and *Russell v Northern Bank Development Corp Ltd and others* [1992] BCLC 1016). (Emphasis added.)

[53] The Federal Court in *Jet Tech* further deliberates that if a party intends to rely on a shareholder's agreement and not the M&A to establish that the conduct was unjust and inequitable pursuant to s 181 of the CA 1965, then, it can only be done in the *Ebrahimi* quasi-partnership scenario. Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd and others* [1972] 2 All ER 492 at p 500 held as follows;

> The words 'just and equitable' are a recognition of the fact that a limited company

A is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act 1948 and by the articles of association by which shareholders agree B to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. *The 'just and equitable' provision does not, as the respondents [the company] suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it, It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; consideration, that is, of a personal character arising* C *between one individual and another,* which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way. (Emphasis added.)

[54] This approach to the concept of unfairness in 'Ebrahimi' has been D followed by the House of Lord in *O'Neill and another v Philips and others* [1999] 2 All ER 961 at p 967 and at p 969 of the judgment, Lord Hoffman further held that;

So I agree with Jonathan Parker J when he said in *Re Astec (BSR) plc* [1998] 2 BCLC 556 at 588: E

> ... in order to give rise to an equitable constraint based on 'legitimate expectation' what is required is a personal relationship or personal dealings of some kind between the party seeking to restrain such exercise, such as will affect the conscience of the former.

F

We are bound by the Federal Court's decision in the *Jet-tech* case. The above-cited cases clearly established that a quasi-partnership requires a relationship of a personal character. If it is not a quasi-partnership, a breach of a shareholders' agreement cannot sustain or be the basis of an oppression suit. G

[55] However, the learned High Court judge took a different view from the Federal Court decision in the *Jet-Tech* case when His Lordship reluctantly accepted the test in the *Jet-Tech* case with regards to shareholders' agreement H that a breach of an agreement between shareholders could never amount to actionable oppression under s 181 of the CA 1965. This can be gleaned from His Lordship's grounds of judgment in para 116 as His Lordship expressed his views as follows:

I [116] The analysis set out in the preceding paragraphs shows that Jet-Tech Materials did not introduce a principle of general application that an action for oppression can never be mounted premised upon breach of the terms of an agreement entered between the shareholders of the company. In my respectful view would be that in Jet-Tec Materials, the Federal Court was of the view that the mere breach of the terms of a shareholders' agreement was not actionable under s 181 absent a finding

that there existed oppression, disregard, unfair discrimination, or unfair prejudice against the complaint.

[56] In the present appeal, as mentioned earlier, no formal shareholders' agreement was ever signed, and executed between the parties (see paras 21 to 23 of our judgment). If Dato' Ray Cheah complained that MPHB was reneging on its promise to fund him, the boards would have responded that it has nothing to do with the company but more on a personal basis. Again, we repeat the same that s 181 of the CA 1965 only applies to the company's affairs and not the shareholders' affairs.

[57] Applying the principle of stare decisis, we do not see that the learned High Court judge should depart in its decision by not following the Federal Court decision in the *Jet-Tech* case. We are of the view that if the learned High Court judge had applied the *Jet-Tech* case as he was obliged to, the claim would have been dismissed on this point alone.

[58] Next, is whether there is a quasi-partnership relationship between plaintiff and MPHB. From the facts of the case and evidence, it was revealed that the first meeting of Dato' Ray Cheah and Madam Kheoh was sometime in March 2007 and the acquisition of the first plot of land (Lot 646) in April was just about a month. At the material time, Dato' Ray Cheah, MPHB and Madam Kheoh were strangers. It is pertinent to note that the rest of the lands were acquired in quick succession and were mostly concluded by August 2007. It is also the evidence of both Dato' Ray Cheah and Madam Kheoh that until Dato' Ray Cheah approached Madam Kheoh on or around April 2007, Dato' Ray Cheah, Madam Kheoh, and even Tan Sri Surin, were unknown to each other except for Madam Kheoh having encountered Dato' Ray Cheah socially on a couple of occasions. Considering the act of acquiring the lands commenced soon after the first meeting, it is hard to conceive that mutual trust and confidence were built up between the plaintiff (Dato' Ray Cheah) and MPHB within the short span of two months. In fact, prior to 2015, Dato' Ray Cheah in his cross-examination evidence affirmed that he did not hold any board position in any of these five JV companies. Dato' Ray Cheah also agrees that he personally did not hold a shareholding in these five JV companies (see Q&A 1312 and 1313, encl 22, Part B Vol 3, p 2750, record of appeal).

[59] The surrounding facts of this case can be concluded that Dato' Ray Cheah a total unknown to the MPBH Group had brought a business proposal to the MPHB Group who in turn considered it like any other business proposal brought to them and dealt with it based on an assessment the business proposal and not on any mutual trust and confidence including Dato' Ray Cheah who did not have any track record on the business of this nature. Looking at the scenario of the involvement of plaintiff and MPHB, it was without doubt that

A the relationship between plaintiff and MPHB was not more than just an arm's length transaction between two commercial entities and nothing more.

B **[60]** Other evidence that supports the defendants' contention that the relationship between plaintiff and MPHB is just a commercial one and not a quasi-relationship is that none of the board members of the five companies have any personal or business relationship with either Dato' Ray Cheah or Datin Teoh Lye Chan (SP3) who is the plaintiff's (Dato' Ray Cheah) representative on the board of Queensway Nominees (Asing) and Queensway Nominees (Tempatan). There is no mutual trust and confidence between the board members on either side of the shareholding. This can be confirmed with Datin Teoh's (SP3) evidence as below:

C

CJC	And do you agree that you have personal knowledge of the terms that were discussed by Dato' Cheah and MPHB in respect of the venture?
TEOH	I have knowledge. The just now what I mentioned.
CJC	Yes, you have the knowledge of what Dato' Cheah told you he discussed with them but have no personal knowledge of what the two parties discussed, agree? You were not present.
TEOH	Agreed My Lord.
CJC	And would it be fair for me to say that you have no idea as to what is going on in the JV entities since 2007 until the dispute arose?
TEOH	Yes, My Lord.
CJC	Now Datin Teoh do you agree that as a director of QNA and QNT since and by QNA I mean Queensway Nominees (Asing) and QNT is Queensway Nominees (Tempatan, the two companies that you sat as a director since 2007 till 2015.
TEOH	Yes, My Lord.
CJC	You have never asked for any documents from MPHB or any other person in respect of QNA and QNT, do you agree?
TEOH	I agree My Lord.

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(Reference: record of appeal, encl 6, Part B Vol 4 p 3388 (PDF 232).)

I **[61]** Further, although the main terms of the joint venture were negotiated between Dato' Ray Cheah and Madam Kheoh, it is within Dato' Ray Cheah's knowledge that any decision to be made by Madam Kheoh has always been done upon consultation with MPHB's management and MPHB's board. Madam Kheoh is only an employee of MPHB and cannot make decisions independently without the approval of MPHB. Thus, personal relationships did not exist.

[62] Considering the facts of the case, we are of the considered view that the relationships between plaintiff (Dato' Ray Cheah) and MPHB are more of a purely commercial relationship and arm's length as compared to a personal relationship which will not likely give rise to a quasi-partnership (see *Brett v Migration Solutions Holding Ltd and Others* [2016] EWHC 523 (Ch) (Ch D) and *Yai Yen Hon & Ors v Lim Mong Sam @ Lim Ah Tee* [1997] 2 MLJ 190; [1997] 2 CLJ 812 (CA)).

[63] As no quasi-partnership (*Ebrahimi-type company*) is at play, the five companies are only bound by the terms of their respective M&A and the Companies Act 1965. The rights issue was implemented to ensure that the shares allocated would maintain the proportionate shareholding of the plaintiff and MPHB once subscribed.

[64] Thus, premised on all stated above, we find that the learned High Court judge has erred and misdirected himself when His Lordship found that there was a quasi-partnership between plaintiff and defendants/MPHB.

WHETHER THE DEFENDANT'S CONDUCT THAT HAS BEEN COMPLAINED OF BY PLAINTIFF AMOUNTS TO OPPRESSIVE CONDUCT

[65] The plaintiff advanced 25 separate instances of the alleged oppressive conduct by the defendant. To avoid repetition and overlapping, the learned High Court judge in paras 132 of his grounds of judgment has summarily divided the alleged oppressive conduct into five broad areas as follows:

(a) the demand by MHPB dated 25 June 2014 that ISM contribute 30% of the purchase price for the De Vegas land that Leisure Dotcom Sdn Bhd acquired;

(b) the rights issue of shares undertaken by Queensway Nominees (Asing Sdn Bhd), Queensway Nominees (Tempatan) Sdn Bhd, and Mulpha Kluang Maritime Carriers Sdn Bhd and the manner how those rights issues were carried out (involving the capitalisation of intercompany debt due to MPHB) which had the effect of diluting plaintiff holdings in each of these JV companies from 30% to fraction of 1%;

(c) the imposition of interest on the shareholder advances made by MPHB for the cash portion of the funding to the JV companies;

(d) the refusal to re-elect Dato' Ray Cheah as a director of the five JV companies; and

(e) the transfer of one share in each of Leisure Dotcom Sdn Bhd, Mulpha Kluang Maritime Carriers Sdn Bhd, and West-Jaya Sdn Bhd to Jayavest Sdn Bhd (which was another company in the MPHB group of

companies) in order to fulfill quorum requirements for shareholders meetings.

[66] Based on the five major complaints advanced by the plaintiff, the learned High Court judge made his findings that the plaintiff had made out the claim for oppression and unfair prejudice based on three different and independent bases;

(a) on the demand by MHPB dated 25 June 2014 that plaintiff contribute 30% of the purchase price for the De Vegas land that Leisure Dotcom Sdn Bhd acquired, the learned High Court judge of the view that the conduct of MPHB and Leisure Dotcom in insisting on a 30% contribution of the total acquisition price for the De Vegas Land coupled with the rejection of bankers' cheques for the 30% contribution to the cash portion constituted conduct that was oppressive of ISM as a shareholder in Leisure Dotcom Sdn Bhd and in disregard of its interest as such a shareholder. On the basis that each of the JV companies was a quasi-partnership, it would not have been open to MPHB to unilaterally dictate to plaintiff how much it ought to contribute to the funding requirements of Leisure Dotcom Sdn Bhd;

(b) as regards the rights issue of shares, the learned High Court judge found that the nature of the relationship of mutual trust and confidence between plaintiff and MPHB, it would not have been open to MPHB to carry out an exercise to increase the share capital of the JV companies by the rights issue without the assent and approval of plaintiff. Such an exercise could only be described as a betrayal of the mutual trust that had underpinned the relationship between them. The right issue was prejudiced to ISM, for it had resulted in a dilution of ISM's interest from 30% to fractions of 1%. Even assuming the JV companies in question were not quasi-partnerships, the rights issue exercises would have breached the terms of the oral agreement between plaintiff and MPHB that the shareholding proportions would be maintained at a 30:70 ratio. The manner in which the exercises were carried out contravened the oral agreement, even if plaintiff possessed the financial wherewithal to take up its rights entitlements. This has caused prejudice to plaintiff because it would have had to inject fresh funds into the affected JV companies simply to maintain the shareholding ratio of 30:70; and

(c) on the imposition of interest on the shareholder advances made by MPHB for the cash portion of the funding to the JV companies, the learned High Court judge also found that ISM's position was that the cash portion was not to bear interest. Queensway Nominees denied that this was the case citing the fact that the listing requirements of Bursa Malaysia and the relevant transfer pricing guidelines would have prevented MPHB from lending to a subsidiary or related company

without charging interest. From 2007, no interest was charged on the cash portion advanced by both shareholders to Queensway Nominees (Asing) Sdn Bhd, Queensway Nominees (Tempatan) Sdn Bhd and West-Jaya Sdn Bhd. From 2010 onwards, MPHB caused the JV companies to pay interest to itself on the cash portion of the advances made by MPHB, but not the cash portion advanced by the ISM. There was no reasonable justification why there had been a different treatment regarding interest on the cash portion advanced by the respective shareholders, which of itself justified a finding of oppression of the rights of plaintiff as shareholder in all of the JV companies, of unfair discrimination against it and or disregard of the plaintiffs rights qua shareholder. This conclusion was not predicated on either a finding that the JV companies were quasi-partnerships or Ebrahimi-type companies, or that the conduct complained of amounted to a breach of the terms of the oral joint venture agreement between them. The refusal to provide financial information to a shareholder when the joint venture company in question was a quasi-partnership would also justify a finding of shareholder oppression. The way in which MPHB had caused the JV companies had been conducted and this in turn prevented plaintiff from discovering the unequal treatment of the shareholder advances.

[67] On the issue of the demand for 30% of the land costs for the Leisure Dotcom Sdn Bhd, the documents, evidence, and facts in this case clearly show that it has always been the responsibility of the plaintiff/Dato' Ray Cheah to pay 30% of the entire purchase price and costs of acquiring the lands in the event the plaintiff intended to have 30% interest in the lands to be moved into the joint venture entity.

[68] Upon perusing PW1 (Dato' Ray Cheah's evidence at Q&A 1450 cross-examination) at trial, PW1 describes the payment terms on the venture as cash portion and loan portion. PW1 claimed that both parties have agreed that a 70% loan ie property loan be funded by MPHB, funding JV companies whereas the other 30% in cash is to be contributed by two partners in the form of 30–70 based on their shareholdings. So, when MPHB through its letter dated 25 June 2014 demanded the plaintiff/Dato' Ray Cheah contribute 30% of the purchase price for the De Vegas land that Leisure Dotcom Sdn Bhd acquired, PW1 was surprised when the demand was made and asked for a meeting with Tan Sri Surin. Without hesitation, on 9 July 2014, PW1 paid RM400,000 on the basis that it was paid to improve their cash flow position even though he was not asked to do so.

[69] There was no evidence before the trial court that the payment of RM400,000 was meant to improve the cash flow, as for the last seven years, all the demands of the cashflow for the five companies had been met by MPHB

and the only issue these five companies had was that the plaintiff failed to uphold its end of the bargain. In fact, the payment for the Leisure Dotcom Sdn Bhd land was paid in full by MPHB on 4 July 2014, prior to the payment made by Dato' Ray Cheah on this RM400,000 on 9 July 2014. There was no discussion on cash flow or even how much was to be paid. The payment of RM400,000 was not meant for the five companies. If it is true, then the plaintiff would have deducted RM400,000 payment when the plaintiff paid the balance 30% of the cash portion and this did not happen in this case.

[70] PW1 further contended that since the venture was a quasi-partnership, it is therefore not open to MPHB to change the payment terms unilaterally. The conduct of MPHB demanding payment is said to be an oppressive conduct against the plaintiff.

[71] As the joint venture exists in the form of an oral agreement in respect of an unincorporated entity, the conduct and the documents between parties must be perused and considered to ascertain where the joint venture is reflected (see *Ng Hong Chai v Teoh Ah Kow* [1999] MLJU 769; [2000] 5 CLJ 175).

[72] It is evident that the conduct of Dato' Ray Cheah himself and on behalf of the plaintiff speaks volumes about the responsibility to pay 30% of the entire purchase price and costs of acquiring the lands. Several payments had been made by the plaintiff/Dato' Ray Cheah towards the loan portion amongst others as follows:

(a) payment of RM120,000 on 11 November 2011 which together with prior payment of RM60,000, being 30% share for the entire acquisition of the 1/13 share of Lot 643;

(b) the shortfall of RM13,002.83 in the purchase price of Lot 1199 as part of the RM2.243m which shortfall forms part of the loan portion;

(c) payment of RM2.243m on 2 October 2012 as interest due on the intercompany loans; and

(d) payment of RM400,000 on 9 July 2014 as part payment towards the interest of the Maybank loans.

[73] Upon perusing PWTs (Dato' Ray Cheah's evidence at Q&A 1450 cross-examination) evidence at trial, all along the way, he claimed that both parties have agreed that 70% loan ie property loan be funded by MPHB, funding JV companies whereas the other 30% in cash is to be contributed by two partners in the form of 30:70 based on their shareholdings and payment of RM2.243m was made as a gesture of goodwill. When PW1 settled the loan portion and paid the RM2.243m in 2012, there was no document from him stating that it was a goodwill payment. Rather, it was a payment in response to

a written demand to which he did not protest. Dato' Ray Cheah in his evidence confirmed that he paid RM2.243m based on the computation sheet provided by MPHB Group and he accepted it without protest (see PW1 evidence at p 2934, encl 22, Part B, Vol 3, record of appeal). It is our respectful view that for plaintiff now to say that JV companies had to bear the loan portion and not the plaintiff is without basis.

[74] PW1 in his evidence confirmed that from December 2012 right up to the time the dispute arose, he received the chasing emails stating how much the plaintiff/Dato' Ray Cheah was to pay for the 30% of the loan portion. In short, plaintiff/Dato' Ray Cheah did not make any objection to the fact that it reflected amounts due from plaintiff at that point in time, and nowhere in Dato' Ray Cheah's email dated 1 December 2014 mentioned that plaintiff was not supposed to be responsible for the loan portion and nowhere did he address the chasing emails at all.

[75] Again, for plaintiff to say that payment of RM2.243m was made as a gesture of goodwill besides payment of RM400,000 to improve the cash flow, in our view, it does not substantiate or commensurate with PW1 evidence at all. When asked about any documentation as regards payment on goodwill, there was none in this case, and this was confirmed by PW1 in his evidence before the court.

[76] Having perused PW1's evidence in its entirety, we are of the considered view that the allegation made by PW1 that payment was made on goodwill and improved the cash flow would be an afterthought. We find that the learned High Court judge erred in his finding that the demand made by MPHB amounted to an act of oppression against the plaintiff.

[77] On the issue of the right issue conducted in Queensway Nominees (Asing), Queensway Nominees (Tempatan), and Mulpha Kluang Maritime Carries Sdn Bhd, it is a clear term of the unincorporated joint venture that the plaintiff would have to pay for 30% of the purchase price and acquisition costs of all the land jointly acquired. It was open to MPHB to compel the plaintiff to adhere to the terms of the venture, and to pay for its portion of the land and costs in acquiring the land.

[78] The trail of the facts of this case also showed that MPHB had already given notice to the plaintiff of the same in its email dated 12 December 2014 and had convened the necessary shareholder's and board meetings to facilitate the undertaking of a right issue to ensure the shareholder of the five companies paid for the respective portion of the lands. MPHB was entitled to do so as this was the agreement with the plaintiff.

A **[79]** As no quasi-partnership (*Ebrahimi-type company*) is at play, the five companies are only bound by the terms of their respective M&A and the Companies Act 1965. The rights issue was implemented to ensure that the shares allocated would maintain the proportionate shareholding of the plaintiff and MPHB once subscribed. There was nowhere in the M&A of the five B companies mentioned that the shareholders are to have a fixed shareholding. In M&A, parties may increase or decrease their shares. In this regard, the same proportionality of shares would have been maintained if the plaintiff participated in the right issue.

C **[80]** The request to participate in the rights issue was also premised on the fact that plaintiff was required to pay for its portion of the land costs in any event under the terms of the joint venture. In this regard, plaintiff/Dato' Ray Cheah did not adhere to its bargain to pay for 30% interest in the Imbi lands D and thus cannot hold 30% interest in the land. It is for this reason that the right issue is the appropriate method to correct the inequity of the shareholding structure in the five companies compared to the interest in the Imbi lands. In fact, plaintiff concedes that the plaintiffs shareholding in the venture would never be 30% as it would be necessary to dilute once all the lands are moved E into the joint venture entity (see Dato' Ray Cheah's evidence on pp 2863–2864, encl 22, Part B, Vol 3, record of appeal). Based on the reason stated, it would be wrong for the learned High Court judge to find that the right issue was prejudicial to the plaintiff as it reduced the plaintiff's 30% interest to a fraction of a percent.

F **[81]** On the issue of charging of interest on MPHB's shareholders' advance and not on the plaintiffs shareholders' advance. The defendants contend that the term of the venture required plaintiff to pay for its 30% interest in the lands held by the five companies. The failure of the plaintiff to make payments as G required has resulted in MPHB inadvertently funding the plaintiff during the short-term intercompany loan (term loan) and/or short-term revolving credit and again when the plaintiff failed to make payments in respect of the Maybank loans.

H **[82]** It was within the plaintiff's knowledge that besides making payments for the unpaid portions of the purchase price of the lands, plaintiff also incurred costs in respect of the interest on all advances made by MPHB to the five companies. It was within the plaintiff's knowledge since the very beginning that all shareholders' advances made by MPHB would impose interest. This I can be seen in the transfer pricing guidelines that were made known to the plaintiff in MPHB's letter dated 11 March 2008 (see letters dated 11 March 2008 issued by QNA, QNT, and WJSB to MPHB). The letters clearly showed that MPHB is entitled to charge 8%pa interest on these advances. We therefore agree with the defendants' counsel submission that the charging interest on the

monies advanced by MPHB to the five companies including the plaintiff is well within what was agreed between the parties and this cannot form the basis of a claim of oppression.

[83] For other complaints ie on the refusal to re-elect Dato' Ray Cheah as a director of the five JV companies, we agree with the learned High Court judge's finding that the refusal by the directors of the JV companies to re-elect Dato' Ray Cheah as a director of the JV companies does not change the fundamental basis of the relationship, which was that all or all major decisions affecting the JV companies could only have been made and implemented with the concurrence of both the plaintiff and MPHB.

[84] As regards the learned High Court judge's finding on the issue of the transfer of one share in each of Leisure Dotcom Sdn Bhd, Mulpha Kluang Maritime Carriers Sdn Bhd, and West-Jaya Sdn Bhd to Jayavest Sdn Bhd (which was another company in the MPHB group of companies), in order to fulfill quorum requirements for shareholders meetings, we concur with the learned High Court judge's finding that the transfer of the one share was not oppressive to plaintiff or prejudicial to its interest. It was not the transfer of one share in the relevant JV companies that was objectionable, but rather the rights issue proposal was forced through the general meetings in the face of objections by the plaintiff.

[85] The plaintiff also claimed that the directors of the JV companies who were nominated by MPHB had acted for improper purpose and in breach of their fiduciary duty by suppressing documents or failing to provide adequate disclosure of information to the plaintiff in connection with the right issue. For this complaint, the learned High Court judge dismissed the plaintiff's claim to make the directors personally liable which we find that is not wrong in fact and law.

DAMAGES AWARDED BY THE LEARNED HIGH COURT JUDGE

[86] Coming back to the second point of the plaintiff's preliminary objection about damages being awarded without hearing evidence and submission of the parties, it is our observation that both parties before the High Court had agreed that damages would be determined after the finding of liability was made and this was acknowledged by the learned High Court judge. Following the bifurcation of the proceedings, there was accordingly, no requirement for the plaintiff to lead evidence in order to prove its entitlement to general damages, exemplary damages, and punitive damages in the course of the trial on liability. In the event that plaintiff succeeded in its claim, plaintiff is entitled to lead evidence and make submissions at the assessment of damages proceedings in order to establish the quantum of damages and or losses suffered

by plaintiff as a result of the oppression conduct of the defendants in particular, claim for general damages, exemplary damages, and punitive damages which we find that it was absent in this case. From our observation of the evidence before the learned High Court judge, we find that several orders as specified in the court's order dated 21 June 2019 were allowed without hearing evidence and submissions by the parties. We find that damages awarded by the learned High Court judge, in any event, were made not in accordance with the law.

[87] Since the finding of oppression is without basis and plaintiff failed to prove that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members within the meaning of s 181 of the CA 1965 as claimed by the plaintiff here, it would be just and fair that no buyout or damages ought to be awarded against the defendants.

CONCLUSION

[88] Our decision is unanimous.

In conclusion, based on the above reasons, we find that there is judicial non-appreciation of evidence by the learned High Court judge before coming to his decision to allow the plaintiff's claim under s 181 of the CA 1965. The learned High Court judge was plainly wrong in his findings that warrant our appellate intervention.

[89] We therefore allow the defendants' Appeal 1220 with costs and set aside the High Court decision dated 21 June 2019.

[90] In light of our decision in allowing Appeal 1220, we therefore dismiss the plaintiff's appeal in Appeal 1341. For Appeal 1220, we allowed costs of RM200,000 here and below subject to the allocator. Whereas for Appeal 1341, we ordered no costs.

CONSEQUENTIAL ORDER SOUGHT BY THE PLAINTIFF

[91] After delivering our decision, the plaintiff's counsel had asked for the refund of its money paid for the purposes of the joint venture amounting to about RM19m plus. We however find that this was neither pleaded and argued in the High Court below nor in this appeal. Henceforth, we are of the view that the appropriate recourse if any, is for the plaintiff to commence a new action to recover the same.

Appeal 1220 allowed with costs of RM200,000 here and below subject to allocator; Appeal 1341 dismissed with no order as to costs.

Reported by Dzulqarnain Ab Fatar